the effect of six independent variables on advertising performance as measured by a station's power ratio – the ability of a station to convert its market share of listeners into share of market revenues. Those variables provided 35.7% of the explanation for why advertising performance improves or declines. Listed in the order of magnitude on their impact on advertising performance, the six variables were: whether the station airs news/talk/sports programming, the station's average audience ranking over the past five years, the age group of listeners if the majority was not between 25-54, whether the station aired minority-targeted programming, whether the station was owned by minorities, and whether it is part of a superduopoly (owned by an entity that controls 3 or more stations in the market).

This study supports the theory that minority ownership is correlated with lower market revenues. Interview testimony presented in the study reveals that broadcasters have seen advertising placement "avails," notices of the availability of competition for ad bids, labeled with "No Urban Dictates," and that advertisers have declined ads because they didn't want members of certain minority groups in their place of business. Other studies have shown that minority radio owners are more likely to broadcast in formats targeted at minority audiences. The analysis indicates that minority format is also negatively correlated with converting audience share into revenues. These practices affect a firm's ability to amass capital to provide programming to their audiences and acquire more media outlets.

### D. Study Supporting a Compelling Interest in Remedying Discrimination Among Advertisers

**Audience Valuation and Minority Media: An Analysis of the Determinants of the Value of Radio Audiences, Journal of Broadcasting & Electronic Media, 46(2), 169-184, 2002, Philip M. Napoli**

This study examines the factors that affect the value of radio station audiences, examining whether the minority composition of the audience affects the perceived "value" of the audience. Audiences can be conceived as a "product" that media organizations market to advertisers who seek exposure for commercial messages. The study examines the "power ratio" (i.e., a station's ability to convert its audience share into revenues) for 461 stations to analyze the effect of various factors on the station's ability to convert its audience into revenues.

The study compares the power ratios of stations that have large minority audiences to those that do not. The study finds that stations whose audience was composed of more than 50% ethnic minorities had an average power ratio of .82, compared to an average power ratio of 1.06 for other stations. The study also finds that the average quarter hour share of Hispanic or African-American listeners was negatively related to power ratios; ethnic composition of the audience appeared to exert a downward pressure on a radio station's ability to convert its audience into advertising revenues.

The paper concludes that the "lower valuations that advertisers place on minority audiences feed into an economic process that works against minority-targeted content being able to compete and remain viable in both the audience and content markets." The paper recommends that policymakers examine what steps are required to maintain the financial viability of minority-targeted media outlets in light of these pressures.

### E. Study Supporting a Compelling Interest in Preventing Discrimination and Passive Government Involvement Therein

**NTIA/OPAD/MTDP, Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States (2000)**

This report provides a history of NTIA's role in promoting minority ownership. It then explores the critical issue of how to define minority ownership and the implications of different definitions. The report also reviews the longstanding value of viewpoint diversity, and examines its role in a changing industry. Moreover, the report describes the impact of consolidation on minority station owners.

The report documents minority owners' perceptions of the impact of the industry consolidation caused by government relaxation of the multiple ownership and duopoly rules. It also documents that minority owners are inclined to locate stations in areas more heavily populated with members of their respective racial or minority group. This has meant that a larger share of minority-owned stations (except for Native American) are located in urban areas. Asian-American stations are particularly concentrated in the largest urban markets, with almost half located in the New York and Los Angeles areas. This data addresses the suggestions by Justice Powell in *Bakke* and Justice O'Connor in *Metro Broadcasting* that it cannot be assumed that minorities will seek to serve their communities.

## VII. Summary of What the Data Presented in the Studies Show as it Relates to Strict Scrutiny

The Section 257 and related studies, along with the attached declarations, establish a foundation for the development of race-conscious and race-neutral measures to increase minority ownership of spectrum licenses. Such measures are justified because of the demonstrated nexus between minority ownership and minority-oriented programming, past and present discrimination against minorities and the other compelling interests described above in Section III.

As discussed in more detail in both the Henderson and Hammond, Sandoval declarations, the compelling interest in promoting minority ownership as a method of promoting programming diversity is addressed by the Content/Ownership Study, the Historical Study and the other studies mentioned in sections V and VI of these comments. These studies all document the clear nexus that exists between minority ownership and the dissemination of programming focused on minority concerns. In view of the Supreme Court's *Grutter* decision, this documented nexus should be sufficient to justify the use of race-based incentives to increase minority ownership. Although *Grutter* pointed out that institutions of higher learning "occupy a special niche in our constitutional tradition," our strong First Amendment guarantees of free speech and interests of the people in having access to richly varied voices and viewpoints, particularly through the finite medium of the electromagnetic spectrum, represents a critical national interest. 103/ Although for the most part not specifically designed as an educational undertaking, broadcasting is a vital public source of that "exposure to widely diverse people, cultures, ideas, and viewpoints" critical to our development and vitality as a society and to our participation in the world. Moreover, the "paramount government objective" of "ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities" is served by measures that make room for all voices in the publicly awarded and regulated opportunities to use the airwaves, and such measures are necessary to permit the "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation [that] is essential if the dream of one Nation, indivisible, is to be realized." 104/

By the same token, the Section 257 studies, considered in light of the history and impact of FCC policies and practices and evidence regarding the broadcasting and wireless industries, also suggest a compelling interest in remedying past and present discrimination. The compelling interest is reinforced by the FCC's documented interest in preventing discrimination in the administration of public resources, the FCC's past race-conscious and race-neutral

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103/ *Grutter*, 539 U.S. at 330.

104/ *Id.*, at 331-32 (internal citations omitted).

incentives and programs, and the FCC's role in enforcing prohibitions on discrimination. Furthermore, the FCC's compelling interest is necessitated by its participation in a discriminatory marketplace. The Section 257 and related studies document discrimination in access to capital, as well as industry discrimination in both advertising and access to information and contacts leading to ownership opportunities.

In addition, the studies provide relevant evidence regarding the FCC's licensing practices. Specifically, they demonstrate not just that FCC minority ownership measures thus far largely have been ineffective, but that these measures actually have served to *discriminate against* minority-controlled applications and in favor of majority-controlled licenses with only nominal minority participation, except for auctions with installment plans. These analyses suggest that discrimination in licensing is deeply ingrained and that the FCC has not eliminated it from its licensing processes. The persistence of discrimination against minority-controlled applications in the comparative hearing regime, particularly in the disparate application of minority credits in favor of majority-controlled applications with nominal minority participation and not for minority-controlled applications, suggests that discrimination continued to affect the judgment of decision-makers in that process. This suggestion is reinforced by the fact that minorities received licenses at statistically higher rates in auctions with installment plans—circumstances in which FCC decision-making is removed from or reduced in the license award process.

The results of the studies clearly suggest, first, that the FCC must engage in careful and critical self-assessment of its policies, practices, personnel and operations to identify any sources of bias and the means by which discrimination is or can be manifested. Second, corrective action should follow this assessment to address the identified manifestations and potential sources of, and opportunities for, discriminatory actions and decisions. Third, these results contribute substantially to the other evidence, discussed above, of a prima facie case of a pattern and practice of discrimination in the award of FCC licenses, providing a compelling interest for consideration of race in awarding licenses to remedy that discrimination. Fourth, these results clearly suggest that, to the extent that auctions continue to be used to award licenses, the availability of installment payment plans (or some similar antidote for access-to-capital barriers) in those auctions is absolutely critical to the opportunity for minority applicants to obtain spectrum licenses.

The Section 257 studies also provide important evidence with respect to the need for race-conscious measures in the area of spectrum license financing. The Capital Markets and Auctions Regression Study, for example, found that, controlling for important variables in a variety of models, minority applicants for wireless licenses and broadcast licensees both were significantly less likely to be afforded debt financing and were charged significantly higher interest rates than non-minorities. The Study also suggests that discrimination in capital markets contributes to the significant racial disparity in minority qualification rates for wireless auctions and in winning license auctions. This evidence adds to the other substantial evidence of discrimination in the licensing process as a basis for remedial consideration of race, and suggests that race-conscious measures are needed to enable minority applicants to secure financing.

The Advertising Study similarly provides evidence suggesting discrimination in the broadcasting industry that affects the ability of minorities to acquire licenses and operate and expand broadcasting businesses. The study found that minority-formatted and minority-owned radio stations earned less revenue per listener and lesser revenue, including even in comparison of minority- and majority-owned stations that targeted minority audiences. While the study did not rule out other factors that might contribute to these disparities, it also referred to documentary and anecdotal evidence of explicit racially discriminatory advertising practices. Thus, while further statistical inquiry might be appropriate to understand the extent to which advertising discrimination explains disparities in broadcasting revenue, the Advertising Study provides evidence from which an inference of discrimination in broadcast advertising can be drawn.

Finally, the Section 257 studies reveal that minority ownership policies should also be considered as a means of promoting the Commission's competition and universal service goals. Several of the studies reveal the willingness of minorities to target and serve communities that would otherwise not be adequately served by non-minorities.

## VIII. Need For Additional Study and Analysis Consistent with Strict Scrutiny

In view of the discussion above, there are a number of measures that the FCC can implement to address minority ownership. The Henderson Declaration suggests general and specific measures that have a strong potential to satisfy the compelling interest and narrow tailoring components of strict scrutiny. 105/ The Henderson Declaration also suggests ways to fill in gaps in the relevant data that would allow the FCC to develop a more comprehensive record for developing race-conscious measures. 106/

Moreover, in order to satisfy the narrow tailoring prong of strict scrutiny it is important for the FCC to develop a record regarding concrete minority ownership proposals. Only with such a record can the FCC satisfy reviewing courts that it has judiciously considered

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105/ *See* Henderson Declaration at 49-55.

106/ *See* Henderson Declaration at 62-63.

both race-neutral and race-conscious policies. In view of this requirement, MMTC urges the Commission to issue expeditiously an NPRM containing concrete minority ownership proposals and commit to resolving the NPRM by a date certain on expedited basis. The Commission's NPRM should address the race-neutral proposals MMTC has previously submitted in response to the Commission's 2002 Biennial Regulatory Review, 107/ proposals submitted in the Commission's Minority Ownership docket, which has been open since 1992 with no ruling, 108/ as well as proposals developed by the FCC's Diversity Advisory Committee, including proposals aimed at increasing minority participation in FM radio and wireless. Finally, in view of the findings contained in the Section 257 studies, other relevant studies and the materials and the declarations discussed herein, the Commission should develop specific race-neutral and race-conscious proposals consistent with such materials, including those proposed in the Henderson Declaration, and include them in the NPRM. 109/

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107/ 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277, 17 FCC Rcd 18503 (2002) ("Biennial Review NPRM"); *see* Initial Comments of Diversity and Competition Supporters, MB Docket No. 02-277 (filed January 2, 2003) at 103-20, and the MMTC April 28, 2003 *Ex Parte* at 11-19; *see also* Brief of Intervenors, *Prometheus Radio Project, et al. v. FCC,* 2003 WL 22052896, docket 03-3388 (filed October 21, 2003) at 14-32.

108/ *See Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, MM Docket 94-149 (NPRM)*, 10 FCC Rcd 2788 n.2 (1995)(incorporating proposals pending from *Revision of Radio Rules and Policies (MO&O and Further NPRM*), 7 FCC Rcd 6387, 6391 ¶ 21 (1992), *modified*, 9 FCC Rcd 7183 (1994)).

109/ Data regarding the access-to-capital barriers faced by minorities suggest that one possible additional proposal could include an auction bidding credit for socially disadvantaged businesses. Under such a policy, minority-owned businesses would be presumed to qualify for such a credit, and non-minorities would be able to demonstrate that they qualify and/or demonstrate that a particular minority-owned business should not qualify by rebutting the presumption. Another possible proposal would involve the reinstitution of a minority auction bidding credit. Several Section 257 studies reveal the significant challenges (including lending discrimination) faced by

## Conclusion

For the foregoing reasons, MMTC urges the Commission to develop expeditiously and put out for comment an NPRM consistent with the proposals discussed herein.

Respectfully submitted,

/s/

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October 12, 2004

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minority-owned businesses that attempt to access the capital necessary to participate in the FCC's spectrum auctions. The record suggests that a minority bidding credit could be tailored to address the access-to-capital problem, while not guaranteeing any particular auction result.